

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

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6 UNITED STATES OF AMERICA

18-CR-6094(G)

7 vs.

8 XAVIER TORRES,

Defendant.

Rochester, New York
April 27, 2022
3:14 p.m.

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11 TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE FRANK P. GERACI, JR.
UNITED STATES DISTRICT JUDGE

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13 JAMES P. KENNEDY, JR., ESQ.
United States Attorney
14 BY: ROBERT A. MARANGOLA, ESQ.
CASSIE M. KOCHER, ESQ.
Assistant United States Attorneys
15 500 Federal Building
Rochester, New York 14614
16 Appearing on behalf of the United States

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18 MAURICE J. VERRILLO, ESQ.
3300 Monroe Avenue
19 Suite 301
Rochester, New York 14618
Appearing on behalf of the Defendant

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ALSO PRESENT: Jennifer Fish, U.S. Probation Office

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P R O C E E D I N G S

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(WHEREUPON, defendant is present).

THE CLERK: This is 18-CR-6094, U.S. vs.

03:14:35PM 5 Xavier Torres.

6 Rob Marangola and Cassie Kocher are here for the
7 Government.

Maurice Verrillo is here with defendant.

9 Jen Fish is here from Probation.

03:14:44PM 10 Mr. Torres appears today for status.

11 THE COURT: Are you Xavier Torres?

THE DEFENDANT: Yes, Your Honor.

13 **THE COURT:** This matter's on for status. At the
14 conclusion of the last testimony in this hearing, there was a
03:15:00PM15 request by the defense that certain records be subpoenaed from
16 various facilities, including Allegany County Jail, Livingston
17 County Jail, Seneca County Jail and Chautauqua County Jail.

18 The Court did grant that application for an in
19 camera review of those documents. I've had a chance to review
03:15:23PM20 those documents. And based upon my review, I don't see any
21 reason for turning them over to the defense.

22 The records are very clear that the defense is
23 aware of these particular issues, conducted a thorough
24 cross-examination of Mr. Nunez while he was on the stand.

03:15:44PM25 There's nothing contained within those records that would add

1 to any of the issues related to the credibility of Mr. Nunez,
2 and the Court did issue an order last evening indicating that.

3 Those records will remain under seal.

4 **MR. VERRILLO:** Your Honor, you'll preserve them for
03:16:07PM 5 appellate review if I need to look at it?

6 **THE COURT:** Yes, they will be preserved under seal.

7 The other outstanding matter -- first of all, is
8 there any additional testimony on that hearing from the
9 Government?

03:16:17PM10 **MR. MARANGOLA:** No, Your Honor.

11 **THE COURT:** From the defense?

12 **MR. VERRILLO:** No, Judge.

13 **THE COURT:** Okay. The second outstanding issue in
14 this case is the Rule 29 motion that was filed on December 1st
03:16:29PM15 of 2021. The Government did file their response.

16 Does the Government want to be heard any further
17 on -- or does the defense want to be heard any further on
18 that?

19 **MR. VERRILLO:** Judge, I can summarize it if you need
03:16:44PM20 it or --

21 **THE COURT:** I don't need it.

22 **MR. VERRILLO:** Whatever the Court prefers. I would
23 just be summarizing what I've raised since --

24 **THE COURT:** No, I've certainly thoroughly reviewed
03:16:53PM25 the papers by the defense and also the Government's response.

1 Does the Government have anything to add?

2 **MR. MARANGOLA:** No, thank you, Judge.

3 **THE COURT:** Regarding the Rule 29 motion, the Court
4 did make rulings at the end of the prosecution case as well as
03:17:05PM 5 at the end of the defense case finding in both matters that
6 there are issues of fact for the jury to make determinations
7 on each of the elements of the charges in this case, and the
8 motions were denied.

9 After reviewing defense submissions in this case,
03:17:21PM10 the Court finds no basis for changing that ruling and,
11 therefore, the motion for a judgment of acquittal pursuant to
12 Rule 29 is denied.

13 There's also a motion pursuant to Rule 33, a motion
14 for a new trial, which the Court would vacate the judgment and
03:17:41PM15 grant a new trial if the interest of justice so required.

16 Again the Court did -- there's a number of bases
17 for that, including an allegation that the Court provided
18 injurious jury instructions; argument that the denial of the
19 suppression issue regarding the search of February 6th of 2016
03:18:04PM20 was improper; that there was an erroneous ruling regarding
21 allowing subsequent conduct after the defendant had relocated
22 to Buffalo to be admitted into this case; that there was error
23 in charging the jury on *Pinkerton* theory. Again, the defense
24 presented all those arguments and the Government did respond.

03:18:32PM25 Anything you want to add to what you submitted in

1 writing?

2 **MR. VERRILLO:** Judge, the only other issue I'd raise
3 is I think the testimony of Mr. Nunez established a number of
4 inconsistencies in the corroborators or the cooperators, and I
03:18:46PM 5 think the Court in the interest of justice can consider that
6 as a basis for a new trial, that there was a lack of -- first
7 of all, there was language of independent corroboration and
8 the testimony of the corroborators were materially
9 inconsistent on a number of issues. And I wanted to make sure
03:19:02PM10 the Court was aware of that argument as well.

11 **THE COURT:** Okay. That was in the papers, but
12 you're doing that --

13 **MR. VERRILLO:** Yes. I'm just saying obviously
14 Mr. Nunez testified subsequent to the motion.

03:19:11PM15 **THE COURT:** Sure, I understand that.

16 Does the Government want to respond to that?

17 **MR. MARANGOLA:** Judge, I have no objection to the
18 Court considering the subsequent testimony of Mr. Nunez. I
19 think there was enough other corroboration from the
03:19:22PM20 cooperating witnesses as well as corroborating aspects from
21 Mr. Nunez's testimony that the Rule 33 motion should also be
22 denied. Thank you.

23 **THE COURT:** Yes, the Rule 33 motion for motion for a
24 new trial is also denied on a number of grounds.

03:19:40PM25 The Court finds that the jury instructions provided

1 were in all respects proper.

2 The issue regarding the suppression of a search of
3 the defendant on February 6th of 2016 was previously
4 determined. There's no basis for re-examining that particular
03:19:57PM 5 ruling.

6 The ground that the Court here in allowing
7 subsequent acts occurring during the conspiracy, in
8 furtherance of the conspiracy, subsequent to the defendant's
9 relocation to Buffalo is also denied in that the -- obviously
03:20:18PM10 a co-defendant -- unless he clearly withdrew from the
11 conspiracy -- is responsible for all acts of the
12 co-conspirators that were conducted during the conspiracy in
13 furtherance of the objectives of the conspiracy and,
14 therefore, the motion for a new trial is denied on that basis.

03:20:40PM15 The argument that the Court improperly charged
16 under the *Pinkerton* theory again is also denied. In
17 conspiracy cases obviously the defendant is liable for the
18 substantive crimes committed by co-defendants provided they
19 are in furtherance of the conspiracy and go toward the
03:20:59PM20 objectives of the conspiracy. In this case the Court did find
21 that prior to charging that to the jury.

22 And, finally, regarding the testimony of Mr. Nunez,
23 although there may have been some inconsistencies with his
24 testimony and some of the testimony received at the trial, the
03:21:15PM25 Court finds it does not rise to the level that it would cause

1 the Court to set aside the judgment of the jury in the
2 interest of justice and, therefore, it's denied on that basis
3 as well.

4 I think the only outstanding matter is the
03:21:34PM 5 objections that were filed and the Government -- did you
6 respond to those?

7 **MR. MARANGOLA:** I believe we did, Your Honor.

8 **THE COURT:** Probation did? So I have that, but I
9 can make those rulings on the day of sentencing.

03:21:48PM10 **MR. MARANGOLA:** Okay.

11 **THE COURT:** Do we have a sentencing date now or we
12 haven't set a new one, right?

13 **MR. MARANGOLA:** I thought we had -- I don't think we
14 have a date scheduled.

03:21:56PM15 **THE COURT:** I don't think we do.

16 **MR. VERRILLO:** Judge, would you be open to any
17 supplemental arguments, I mean, in terms of what happened with
18 Nunez?

19 **THE COURT:** In the hearing?

03:22:06PM20 **MR. VERRILLO:** That's new obviously. I hadn't
21 responded.

22 **THE COURT:** Do you want to argue now or submit
23 something in writing?

24 **MR. VERRILLO:** I would prefer to submit something.
03:22:14PM25 If you can give me a schedule to do that --

1 **THE COURT:** Okay, sure. Let's put sentencing on for
2 May 19th at 10 a.m..

3 If you want to submit something, can you do it by
4 the 6th? By next Friday?

03:22:50PM 5 **MR. VERRILLO:** May 6th?

6 **THE COURT:** May 6th, next Friday, believe it or
7 not.

8 **MR. VERRILLO:** Wow, I'm not even into May yet. I'm
9 sorry, yeah, that would be okay.

03:23:01PM10 **THE COURT:** The Government respond by the 13th?

11 **MR. MARANGOLA:** Yes, Judge.

12 **THE COURT:** Okay, all right. We'll have the matter
13 on for sentencing May 19th, 10 a.m.

14 Anything further? Government?

03:23:12PM15 **MR. MARANGOLA:** No, thank you, Your Honor.

16 **MR. VERRILLO:** All set, Judge. Thank you.

17 **THE COURT:** You're all set? Okay, thank you. Have
18 a good day.

19 (**WHEREUPON**, proceedings adjourned at 3:23 p.m.)

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CERTIFICATE OF REPORTER

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3 In accordance with 28, U.S.C., 753(b), I certify that
4 these original notes are a true and correct record of
5 proceedings in the United States District Court for the
6 Western District of New York before the Honorable Frank P.
7 Geraci, Jr. on April 27th, 2022.

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S/ Christi A. Macri

10 Christi A. Macri, FAPR-RMR-CRR-CSR(CA/NY)
Official Court Reporter

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